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IN THE

Supreme Court of the United States

October Term, 1977

No. 76-1607

SECURITIES & EXCHANGE COMMISSION,
Petitioner,

-against-

SAMUEL H. SLOAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR SAMUEL H. SLOAN IN RESPONSE

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-17a), as modified (Pet. App. 18a-20a), is reported at 547 F. 2d 152 (2d Cir. 1976).

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1976 and a petition for rehearing was denied on January 24, 1977. On April 22, 1977 Mr. Justice Marshall extended the time in which to file a petition for a

writ of certiorari to and including May 15, 1977. The petition was filed on that date. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the Securities & Exchange Commission exceed the authority given to it in §12(k) of the Securities Exchange Act which authorizes the Securities & Exchange Commission "summary to suspend trading in any security (other than an exempted security) for a period not exceeding ten days" when it suspended trading in a security for a period of more than a year by issuing a series of thirty-seven consecutive ten-day suspension orders?

2. Did this case become moot when each of the thirty-seven consecutive ten-day suspension of which review was sought had expired before the time the court of appeals made its decision declaring all but the first order to be invalid?

3. Were each of the consecutive ten-day trading suspension orders supported by substantial evidence and, if not, must they be vacated?

4. Does §12(k) of the Securities Exchange Act, which authorizes the Securities & Exchange Commission "summarily to suspend trading in any security" whenever "in its opinion the public interest and the protection of investors so require," constitute an unconstitutional delegation of legislative authority to an administrative agency and does it violate other provisions of the Constitution?

STATEMENT

This petition for a writ of certiorari seeks review of a decision by a court of appeals which reviewed a series of thirty-seven consecutive ten-day orders which suspended

trading in all securities of Canadian Javelin Ltd. These securities were listed on the American Stock Exchange. The court of appeals held all but the first of these thirty-seven trading suspension orders to be invalid and declared (Pet. App. 17a):

> "The S.E.C. is, therefore, directed to discontinue forthwith its adoption and use of successive ten-day suspension of trading orders to order the suspension of trading in a security for an extended period, i.e. in excess of ten days.
>
> It is so ordered."

In so doing, the court of appeals reached and agreed with one of a number of contentions the respondent, Samuel H. Sloan, had made in a series of suits and proceedings which he had brought challenging the validity of S.E.C. trading suspension orders. However, the court of appeals rejected two additional arguments advanced by Respondent. First, it held that there was sufficient substantial evidence to justify the S.E.C.'s initial ten-day trading suspension order (Pet. App. 11a). Second, it held that a single ten-day trading suspension order does not violate the Constitution. In the latter regard, the court of appeals stated (Pet. App. 17a):

> "For a single ten-day suspension no prior notice or a hearing is required because the proceeding is summary in nature and because the emergency aspect of the order, issued to protect the public interest and give protection to investors, makes it necessary."

The controversy which the petition brings before this Court arose out of the policies of the S.E.C. regarding trading suspensions, particularly suspensions of trading in securities of Canadian Javelin Ltd. Although page 9 of the petition states that between 1964 and November, 1976 the S.E.C.'s suspension power was used with respect to a total

of 941 securities, no security has been suspended on as many distinct occasions as Canadian Javelin Ltd. Canadian Javelin Ltd. and its principal stockholder, John C. Doyle, who at all times has owned approximately 20% of the stock in the company, have established considerable notoriety as a result of their continuing bouts with the S.E.C. spanning a period of more than twenty years. This notoriety has been enhanced by the publicity often given these matters by the financial news media.[1] To some extent, the running dispute between Canadian Javelin Ltd. and the S.E.C. stems from differences between Canadian and United States securities laws. Each province of Canada has its own securities laws and the pervasive national scheme of securities regulation which exists in the United States does not exist there. In a number of instances, officers of Canadian Javelin Ltd., none of whom are residents of the United States, have engaged in activities which are strictly legal in Canada but which, nevertheless, have been deemed by the S.E.C. to run afoul of federal securities law.[2]

1. See e.g. "Brash Entrepreneur: Canadian Javelin Has Never Earned a Lot But John Doyle Has," *The Wall Street Journal*, March 1, 1972, p. 1 col. 6; "Now You See It: Canadian Javelin Doesn't Have Gold Right in Panama, Nation Says; Firm Disputes That," *The Wall Street Journal*, October 25, 1973, p. 46 col. 1. The first of the above articles precipitated a sharp decline in the price of Canadian Javelin Ltd. leading to an S.E.C. trading suspension on March 7, 1972. The second caused the failure of Canadian Javelin Ltd. to open on the American Stock Exchange on October 25, 1973. A trading halt continued from that date until November 29, 1973, when the S.E.C. suspended trading.

2. For example, on July 14, 1976 Quebec Superior Court Justice Rejane L. Colas ordered that a special meeting of stockholders of Canadian Javelin Ltd. be held and that S.E.C. regulations including S.E.C. proxy rules be complied with "as far as practicable." The S.E.C. intervened and asked Justice Colas to reverse her decision but on July 29, 1976 she rejected the contentions of the S.E.C. and issued a decision stating that inasmuch as it was not "practicable" for Canadian Javelin Ltd. to comply with S.E.C. proxy rules, it need not do so. "John Doyle—Evil Genius," *Barron's*, August 16, 1976, p. 15, records the reaction of S.E.C. enforcement chief Stanley Sporkin to this development:

Pursuant to the Freedom of Information Act, Respondent has obtained from the S.E.C. copies of approximately 10,000 pages of documents relating to the S.E.C.'s twenty-year investigation of the affairs of Canadian Javelin Ltd. From reviewing this material and from examining documents filed in the course of more than twenty suits brought against Canadian Javelin Ltd. and its principal officers, Respondent has familiarized himself with the underpinnings of the ongoing dispute between the S.E.C. and Canadian Javelin Ltd.

Although Canadian Javelin Ltd. currently has approximately 13,000 stockholders in the United States, its shares were never sold to the American public through a lawful underwriting and no registration statement was ever filed by Canadian Javelin Ltd. to comply with the registration provisions of the Securities Act of 1933. Instead, starting shortly after the company was founded in 1951, its shares were distributed via a "boiler-room" operation in which high pressure salesmen operating in Canada telephoned United States investors and induced them to purchase Canadian Javelin Ltd. shares. As a result of this, on July 25, 1958 the S.E.C. placed Canadian Javelin Ltd. on its "Canadian Restricted List," otherwise known as the "S.E.C. blacklist." Although this action was taken prior to the 1964 amendment to the Securities Exchange Act which authorized the S.E.C. to suspend trading in securities traded over-the-counter, the blacklisting of Canadian Javelin Ltd. shares amounted to a trading suspension. On September 25, 1958, the S.E.C. filed a civil

" 'We are not going to take this lying down,' barked Sporkin. 'There were brazen acts conducted in Canada. The American stockholders are being put upon here.' "

While Sporking was making these remarks, the S.E.C. staff was telling the court of appeals that the instant case was moot because there was no reason to believe the S.E.C. would find it necessary again to suspend trading in Canadian Javelin Ltd.

suit alleging the above-described boiler-room operation and on the same day Canadian Javelin Ltd. and John C. Doyle consented to an injunction. See *S.E.C. v. Canadian Javelin Ltd.*, 1958 Civil Action File No. 138-85 (S.D.N.Y.). The terms of the consent decree were curious because the parties entered into an oral undertaking which was set forth at a hearing before Judge Sidney Sugarman under which, in return for the consent by Canadian Javelin Ltd. and Doyle to an injunction, the S.E.C. agreed to remove Canadian Javelin Ltd. from its Canadian Restricted List and Canadian Javelin Ltd. agreed to list its shares on the American Stock Exchange and to file 10-K reports with the S.E.C. as well as all other financial reports required by the S.E.C. to be filed by public corporations in the United States. The rationale for this was that at the time of this consent decree, John C. Doyle was a resident of the United States and Canadian Javelin Ltd. maintained its corporate headquarters in New York City and was only nominally incorporated in Canada. The listing on the American Stock Exchange became effective on June 26, 1959.

Subsequently, the situation changed. John C. Doyle jumped bail following an adverse court of appeals decision in *United States v. Doyle*, 348 F. 2d 715 (2d Cir. 1965) *cert. denied*, 382 U.S. 843 (1965). Doyle then fled to Canada where by that time Canadian Javelin Ltd. had moved its corporate offices. Since the act of which he had been convicted, namely mailing, in 1957, 50 shares of unregistered Canadian Javelin Ltd. stock, did not constitute a violation of Canadian law, he was considered by the U.S. Attorney's office to have committed a non-extraditable offense.[3] To this day, he is a fugitive from justice.

3. See "Doyle Out as Chief of Canadian Javelin," *The New York Times*, July 21, 1965, p. 47 col. 6.

After jumping bail, an act undertaken with considerable fanfare and publicity,[4] Doyle resigned as a corporate official. However, this caused adverse consequences and one year later Doyle re-assumed his position as chief executive officer of Canadian Javelin Ltd.[5] Not surprisingly, thereafter a state of continuing antagonism prevailed between the S.E.C. and Canadian Javelin Ltd., a company which was at that point being controlled by a person who had become a fugitive from justice as a result of being convicted of violating federal securities laws. On March 17, 1971, the S.E.C. issued the first of many ten-day trading suspension orders.[6]

The initial trading suspension order was renewed once so that the trading suspension in total duration lasted from March 17, 1971 until April 5, 1971.[7] Thereafter, trading was allowed to resume and continued until March 7, 1972,

4. "John Doyle Tells Why He Fled to Canada," *The New York Times*, July 26, 1965, p. 33, col. 4.

5. "Fugitive Financier Returns to Role at Javelin After Year Away," *The New York Times*, September 24, 1966, p. 27, col. 2; "Javelin Gives John Doyle Committee Chairmanship," *The New York Times*, September 26, 1966, p. 63, col. 4.

6. The release announcing the trading suspension stated that "the suspension was ordered because of the unavailability of adequate and accurate information concerning . . . mineral deposits within a mining concession in the Republic of Panama. . . . In recent weeks there have been widespread rumors concerning this concession and the price of securities of Canadian Javelin has increased on relatively high volume." Securities Exchange Act Release No. 9111 (March 17, 1971).

7. A lengthy release was issued by the S.E.C. announcing that the suspension would be terminated. This release warned that broker-dealers who solicit transactions in the securities of Canadian Javelin without first making a diligent inquiry in the Panamanian project, may be violating federal securities laws. Securities Exchange Act Release No. 9124 (March 30, 1971).

when the S.E.C. issued the first of a longer series of trading suspension orders lasting from that date until August 9, 1972.[8] With the termination of that series of suspension orders, trading again resumed in the normal manner on the American Stock Exchange and continued until November 29, 1973, when the S.E.C. again ordered a trading suspension[9] and this time simultaneously instituted a civil action entitled *S.E.C. v. Canadian Javelin Ltd.*, Docket No. 73 Civil 5047 (S.D.N.Y.).[10] This trading suspension continued until January 26, 1975.[11] At that point the S.E.C. allowed the suspension to terminate but on April 29, 1975 the S.E.C. commenced yet a fourth series of trading suspension orders[12] which continued until May 2, 1976.[13] At that point, the trading suspension again officially terminated. However, according to a memorandum dated July 1, 1975, a copy of which is included as Appendix A to this response, representatives of the American Stock

8. The release announcing the trading suspension stated that it "was ordered because of the unavailability of adequate and accurate information concerning certain actions taken by the government of Newfoundland with respect to the company's linerboard project." Securities Exchange Act Release No. 9528 (March 7, 1972). The subsequent release announcing the termination of the trading suspension contained a lengthy statement concerning the reasons for the suspension. Securities Exchange Act Release No. 9715 (August 3, 1972).

9. Securities Exchange Act Release No. 10534, 3 SEC Docket 154 (November 29, 1973).

10. The complaint is described in Litigation Release No. 6160, 3 SEC Docket 154 (November 29, 1973). That suit precipitated the filing of a class action which is the subject of a petition for a writ of certiorari presently pending before this Court. See *Sloan v. Bonime*, No. 77-374.

11. Securities Exchange Act Release No. 11172, 6 SEC Docket 53 (January 9, 1975); Securities Exchange Act Release No. 11178, 6 SEC Docket 78 (January 13, 1975); Securities Exchange Act Release No. 11197, 6 SEC Docket 145 (January 22, 1975).

12. Securities Exchange Act Release No. 11383, 6 SEC Docket 780 (April 29, 1975). (Appendix D, *infra*).

13. Securities Exchange Act Release No. 12393, 9 SEC Docket 509 (April 29, 1976).

Exchange had agreed to continue its trading suspension until such time as the S.E.C. was in a position to reveal the extent of a manipulation in the market for Canadian Javelin Ltd. shares. This assertion was repeated in subsequent memoranda. Accordingly, in spite of the fact that the S.E.C. terminated its suspension of trading in Canadian Javelin Ltd. on May 2, 1976, trading has to date not resumed on the American Stock Exchange. In addition, the S.E.C. has invoked Rule 15c2-11, 17 C.F.R. §240.15c2-11, to prohibit trading in Canadian Javelin Ltd. shares in the over-the-counter market. This rule, in pertinent part, provides that whenever a security has not been actively quoted in a "national quotations medium" for a period of more than three days, quotations may not resume until such time as the issuer of the security in question has filed current financial reports satisfactory to the S.E.C. and a registered broker-dealer applies for permission to commence active quotations in the security. On November 8, 1976, the S.E.C. commenced an action in the District Court for the District of Columbia entitled *S.E.C. v. Canadian Javelin Ltd., et al.* Civil Action No. 76-2070 in which the S.E.C. alleged that Canadian Javelin Ltd. was delinquent in filing its 10-K report.[14] Although Canadian Javelin Ltd. subsequently filed its delinquent 10-K report, the S.E.C. has since amended the complaint to allege that financial reports filed by Canadian Javelin Ltd. were improper and contained false and misleading statements.[15] Because of the S.E.C.'s interpretation and application of Rule 15c2-11, the continued pendency of this suit acts as a bar to the resumption of over-the-counter trading in Canadian Javelin Ltd.

14. See Litigation Release No. 7642, 10 SEC Docket 948 (November 10, 1976).

15. See Litigation Release No. 7779, 11 SEC Docket 1772 (February 14, 1977).

Altogether, the four periods during which trading in Canadian Javelin Ltd. has been suspended amount to slightly less than 33 months. Since the applicable provisions of the Securities Exchange Act gave the S.E.C. the authority to suspend trading in a security "for a period not exceeding ten days," the S.E.C. accomplished most of its 33-month trading suspension through its practice of tacking on an additional ten-day suspension at the time the ten-day suspension order then in effect was about to expire. According to the petition, the S.E.C. first adopted this procedure in 1944 (Pet. 7-8) and has since followed it in suspending trading in a total of 235 securities (Pet. 9) thereby lengthening the total duration of a trading suspension beyond the ten days permitted by statute. Perhaps the best known example of this concerned the securities of Continental Vending Machine Corp., which were suspended from trading for a 13 year period from March 8, 1963 until June 2, 1976.[16]

Respondent's efforts to have this practice declared illegal and to invalidate the trading suspension of securities of Canadian Javelin Ltd. on this and other grounds commenced on June 27, 1974, when Respondent instituted an action in the United States District Court for the Southern District of New York by filing a complaint which alleged that the S.E.C. had abused its discretion, acted illegally, and violated the constitutional rights of Respondent by suspending trading in Canadian Javelin Ltd. and a number of other securities. Subsequently, Respondent filed an amended complaint which alleged specifically that the S.E.C. had suspended trading in a total of 28 securities in which Respondent was a stockholder or a market maker, among them being Canadian Javelin Ltd. The S.E.C. filed an answer in which it admitted that it had suspended trading in the 28 securities in question and in which it

16. See Securities Exchange Act Release No. 12505, 9 SEC Docket 787 (June 2, 1976).

averred as affirmative defenses that the S.E.C. could not be sued *eo nomine*, that a district court has no jurisdiction over the S.E.C. and that the exclusive remedy of Respondent was to file a petition for review of each trading suspension order with a court of appeals. The district court agreed and dismissed the complaint and this dismissal was affirmed by the court of appeals. See *Sloan v. S.E.C.*, 535 F.2d 676 (2d Cir. 1976), *cert. denied* 429 U.S. 885 (1976).[17]

By this time, Petitioner had filed in the United States Court of Appeals for the Second Circuit a petition for review challenging the validity of the then current orders suspending trading in Canadian Javelin Ltd., the only one of the 28 securities in which Respondent had a financial interest which was still the subject of a current trading suspension order. Respondent's petition for review was filed on November 8, 1974. Under Rule 17(a) of the Federal Rules of Appellate Procedure, the S.E.C. had 40 days to file the record of the trading suspension orders challenged in the petition for review. The S.E.C. took the full 40 days and then filed only a certified list of the documents constituting the record. However, after Respondent complained to the court of appeals, the S.E.C. filed the full record of the trading suspension orders being challenged. By this time, the ten-day trading suspension orders of which review had been sought had long since expired and had been superceded by subsequent orders. On January 26, 1975, about the time the S.E.C. finally filed the record, it allowed its trading suspension in Canadian Javelin Ltd. to terminate. Shortly thereafter, the S.E.C. filed in the court of appeals a "suggestion" that the court dismiss the petition for review as "moot." The court of appeals did not act on that suggestion. Briefs were thereafter filed and on

17. The amended complaint in that action alleged violations of antitrust laws by certain private party defendants and, in addition, averred that S.E.C. Rule 15c2-11 and other rules were unconstitutional.

September 26, 1975 oral argument was held before the court of appeals. By that time trading in Canadian Javelin Ltd. shares again had been suspended, this time by a series of orders commencing on April 29, 1975 at 3:00 p.m. and renewed every ten days thereafter. In spite of the fact that a trading suspension of shares of Canadian Javelin Ltd. was then in effect, the S.E.C. argued before the court of appeals that the question of the validity of the prior trading suspension orders was moot because the orders then currently in effect were not part of the same series of orders which included the trading suspension orders which were challenged in the petition for review. Although the decision subsequently rendered by the court of appeals did not discuss the mootness question, it dismissed the petition for review "without prejudice" thereby making it clear that it did not agree with the S.E.C.'s contention that the question of the validity of the prior trading suspension orders was moot. See *Sloan v. S.E.C.*, 527 F.2d 11 (2d Cir. 1975) *cert. denied*, 426 U.S. 935 (1976).

The dismissal "without prejudice" by the court of appeals of the petition for review was apparently based on a statement made at oral argument by the attorney representing the S.E.C. which implied that the S.E.C. would be willing to grant Respondent "some sort of administrative hearing."[18] The court of appeals also stated that the record filed by the S.E.C., which consisted of summary trading suspension orders and expurgated memoranda similar to that included as Appendix A, was "insurmountably sparse."

18. Earlier during the same oral argument, when one of the members of the panel of the court of appeals first asked the attorney for the S.E.C. what remedy Respondent had, the attorney replied, "He doesn't have any." It was only after repeated questioning from the panel that the attorney for the S.E.C. felt obliged to soften his position and to assert that an administrative hearing would be available.

Immediately following this decision, Respondent wrote the S.E.C. and requested the promised administrative hearing. Approximately one month later, the S.E.C. responded with a letter which stated that it would not entertain this request in the absence of an affidavit setting forth the facts which Respondent intended to prove at the hearing and which demonstrated that the S.E.C. had abused its discretion in suspending trading in Canadian Javelin Ltd. On March 11, 1976, Respondent filed a "verified petition for review" which met the requirements described in the letter from the S.E.C. Thereafter, according to a memorandum dated April 9, 1976 which the S.E.C. included in the record it subsequently filed with the court of appeals, a copy of which is included as Appendix B to this response, the S.E.C. decided to adopt a procedure "whereby a person claiming to be adversely affected by a suspension could petition not to renew such a suspension." Although the adoption of this procedure had not been publicly announced, the S.E.C. relied upon it in its decision dated April 21, 1976 which denied Respondent's request for an administrative hearing and continued the suspension of trading in Canadian Javelin Ltd. for an additional ten-day period (See Pet. App. 21a-23a). The S.E.C. officially announced the adoption of this procedure the next day (See Pet. App. 24a-26a; Securities Exchange Act Release No. 12361, 9 S.E.C. Docket 482 (April 22, 1976)).

On April 23, 1976, immediately upon receipt of the order of the S.E.C. dated two days earlier denying Respondent's request for an administrative hearing, Respondent filed in the court of appeals a petition for review of each of the 37 consecutive orders which suspended trading in Canadian Javelin Ltd. beginning with the order dated April 29, 1975. At the same time, Respondent filed a motion for a stay, a proposed order to show cause, and a request for an ex-

pedited review of the S.E.C.'s trading suspension orders. Rather than respond in writing, an attorney for the S.E.C., without notifying Respondent, called the office of the clerk of the court of appeals and said that the court should not act on Respondent's motion because the S.E.C. had decided that it was going to terminate its trading suspension of Canadian Javelin Ltd. at the end of the current ten-day period. Respondent was not told about this telephone conversation at the time and neither he nor the public were informed that the S.E.C. intended to terminate its trading suspension until the S.E.C. announced this in a press release issued several days later.[19] As the result of the oral request by the S.E.C. attorney in question, the court of appeals never acted on Respondent's request for a stay and an expendited review. Instead, after several extentions of time granted at the request of the S.E.C., briefs were filed and the case was argued orally and the decision for which review is now sought followed.

ARGUMENT

I

It is submitted that this court should grant the petition for a writ of certiorari, but not for the reasons given in the petition. One of the two principal arguments given as reasons for granting the writ, namely the claim that this case is moot, is so meritless as to hardly warrant detailed discussion. The S.E.C. continues to argue that the question of the validity of the trading suspension orders is moot in face of the fact that, as Judge Gurfein noted during the oral argument before the court of appeals, this case is "just like the old Southern Pacific Terminal case," i.e. *Southern Pacific Terminal v. ICC*, 219 U.S. 498, 515 (1911) where this Court held that "short-term orders, capable of

19. See note 13, *supra*.

repetition yet evading review" would not be declared moot. The reason for this is obvious. If it were otherwise the S.E.C. in a case such as this would have the power to prevent review of its own trading suspension orders merely by allowing the suspension to terminate prior to the oral argument or the time of the decision by the court of appeals. Moreover, in this case both times that Respondent filed a petition for review of trading suspension orders, the S.E.C. took the full 40 days allowed by Rule 17(a) of the Federal Rules of Appellate Procedure prior to filing the record and resisted Respondents efforts to obtain expedited review. As a result of this, excepting the unlikely possibility that a court of appeals might be willing to review a trading suspension order prior to the filing of the record, it will be impossible as long as the S.E.C. adheres to its policy for a court of appeals to have the opportunity to review a trading suspension order while that order is still in effect. In other words, when the S.E.C. asks this court to declare this case to have been moot it is really asking this Court to declare that under no circumstances can an S.E.C. trading suspension order ever be reviewed by any federal court unless the S.E.C. specifically acquiesces to such review. This attempt to frustrate all judicial review of S.E.C. suspension orders cannot be permitted to succeed because otherwise the S.E.C. would have "a powerful weapon against public law enforcement." See *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

The facts of the instant case demonstrate the invalidity of the S.E.C.'s mootness argument. It was clear during the first oral argument before the court of appeals that the court was prepared to vacate the then current trading suspension order and would have done so had the attorney for the S.E.C. not claimed that the S.E.C. was prepared to grant "some sort of administrative hearing." Having gained this reprieve, the S.E.C. thereafter denied Respondent's initial written request for an administrative

hearing because it was not "verified or properly formulated" (Pet. App. 10a) as required by a procedure not yet promulgated. On March 11, 1976, Respondent submitted to the S.E.C. a "verified petition" which met all of the requirements of its still secret procedure. Thereafter, the S.E.C. issued four more ten-day suspension orders without taking action on Respondent's request for an administrative hearing.[20] Finally, in an obvious attempt to place the S.E.C. in the most favorable position or to avoid judicial review altogether without in any way voluntarily curtailing the exercise of its suspension powers, the S.E.C. denied Respondent's request for a hearing and suspended trading for one more ten-day period. Under governing principles set forth in *Roe v. Wade*, 410 U.S. 113, 125 (1973); *Sibron v. New York*, 392 U.S. 40, 50-58 (1968) and many other cases there can be no question that this case is not moot.

Moreover, as the court of appeals noted, "the issue of statutory construction and interpretation never became moot and has been ruled upon in this review" (Pet. App. 17a). It is evident that the issue of statutory construction is still not moot because by filing its petition for a writ of certiorari the S.E.C. has indicated desire to return to its practice of issuing consecutive ten-day suspension orders. Although it says it will perhaps not issue future consecutive orders suspending trading in Canadian Javelin Ltd., the petition specifically requests this Court to vacate the order of the court of appeals which ordered it to discontinue "its adoption and use of successive ten-day suspension orders" (Pet. App. 17a). Were this case truly moot, there would be no need for the S.E.C. to make this request. The "public interest in having the legality of the practices settled, militates against a mootness conclusion." *United States v.*

20. Those four orders suspended trading for ten-day periods commencing March 14, 1976, March 24, 1976, April 3, 1976 and April 13, 1976 respectively.

W.T. Grant Co., supra, 345 U.S. at 632. This case further cannot be declared moot in view of the principle that "voluntary cessation of allegedly illegal conduct . . . does not make the case moot," *Id.*, a principle upon which the S.E.C. often relies in prosecuting suits, including suits against Respondent, requesting an injunction. Of course, this principle need not be invoked here because here the allegedly illegal conduct, namely suspending trading in a security for successive ten-day periods, did not voluntarily cease but ceased at the order of the court of appeals.

The cases cited in the petition are not helpful to the S.E.C.'s position. For instance, the petition cites *S.E.C. v. Medical Committee for Human Rights*, 404 U.S. 403 (1972) (Pet. 12). However, that decision was explained in *Mancusi v. Stubbs*, 408 U.S. 204, 206 n. 1 (1972) where this Court stated that the case had become moot "not because of compliance by the S.E.C. with the judgment under review, but because of the action of Dow Chemical which was not required to do anything by that judgment." In view of this decision, the contention by the S.E.C. that the fact that it had ceased issuing a series of consecutive ten-day suspension orders in Canadian Javelin Ltd., but not in other securities,[21] prior to the November 18, 1976 decision by the court of appeals, is untenable.

As to the other cases cited in the petition, in arguing that the holding by the court of appeals "on the issue of mootness is sufficiently contrary to this Court's recent decisions to warrant summary reversal" (Pet. 12, n. 8), the S.E.C. finds it convenient to overlook a decision of this Court more recent than those cited which deals squarely with the issue, namely *Nebraska Press Association v.*

21. See e.g. Litigation Release No. 7650, 10 SEC Docket 980 (November 15, 1976), in which the S.E.C. announced that its suspension of trading in securities of Diversified Industries, Inc., which had commenced on June 10, 1976, would continue until November 16, 1976.

Stuart, 427 U.S. 539, 546 (1976), where this Court explained most of the cases cited in the petition and reiterated the principle that a case does not become moot "simply because the order attacked has expired, if the underlying dispute between the parties is 'capable of repetition, yet evading review'." Respondent was a broker-dealer registered with the S.E.C. until April 28, 1975 when the S.E.C. revoked his broker-dealer registration. As a registered broker-dealer, Respondent had occasion to deal in many securities and it is not surprising that among the 941 securities in which the S.E.C. has suspended trading were 28 securities in which Respondent had a financial interest. As Respondent set forth in an affidavit filed with the court of appeals in opposition to the S.E.C.'s motion in that court to dismiss this case as moot, Respondent continues to own stock in nearly 400 publicly traded corporations and in view of the S.E.C.'s proclivity for issuing trading suspension orders, it is apparent that it is only a question of time before the S.E.C. suspends trading in another security so as to adversely affect Respondent. This circumstance defeats the S.E.C.'s claim that Respondent "has not shown that he is likely to be adversely affected by consecutive suspension orders in the future" (Pet. 12).

Moreover, as Respondent pointed out to the court of appeals, in ordering Respondent's broker-dealer registration revoked, an order which was affirmed in another part of the decision of the court of appeals and which is now the subject of a pending petition for a writ of certiorari filed under No. 76-1547, the S.E.C. relied on a finding by Judge Ward that Respondent had a net capital deficiency of $4,383 on May 24, 1973. (See petition in No. 76-1547, Pet. App. 32a, n. 19 and *S.E.C. v. Sloan*, 369 F. Supp. 996, 1001 (S.D.N.Y. 1974)). However, that computation was based on a ruling by the S.E.C. dated June 8, 1973, which was applied retroactively by the S.E.C. staff in

computing Respondent's net capital, under which fails-to-deliver in suspended securities could no longer be counted as an asset in computing net capital.[22] Respondent had a fail-to-deliver amounting to $11,000 in the stock of Triex International Corp., a security which the S.E.C. suspended from trading from December 15, 1972 until December 23, 1973 through the use of consecutive ten-day suspension orders.[23] The figure of $11,000 was deducted by the S.E.C. staff from Respondent's net capital in order to arrive at the $4383 figure. In other words, had it not been for the trading suspension of Triex International Corp., which exceeded ten days, or had the S.E.C. not applied its June 8, 1973 interpretative release retroactively, Respondent's net capital in May, 1973 would have exceeded the net capital requirement.[24] Since the decision of the court of appeals can be taken to have the effect of declaring all successive ten-day trading suspension orders of the S.E.C. to have been invalid, it follows that the suspension for more than ten days of trading in Triex International Corp. was also invalid, which should form sufficient ground for vacating the order of the S.E.C. revoking Respondent's broker-dealer registration and remanding the case to the S.E.C., provided the order of the

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22. See "Interpretation of Rule 15c3-1 Respecting the Net Capital Treatment of Securities Positions and Transactions in Suspended Securities," Securities Exchange Act Release No. 10209, 1 SEC Docket, No. 19, p. 12 (June 8, 1973).

23. See Securities Exchange Act Release No. 9912 (December 12, 1972); Securities Exchange Act Release No. 10571, 3 SEC Docket 257 (December 19, 1973).

24. The S.E.C. also relied on a finding by Judge Ward of a net capital deficiency in August, 1973. Triex International Corp. was still suspended from trading in August, 1973 and consequently the same $11,000 was deducted in computing Respondent's net capital. Although the figure arrived at was more than $11,000, if full market value is given for certain securities erroneously valued at zero by the S.E.C. staff, Respondent will be shown to have had sufficient net capital in August, 1973 as well.

court of appeals invalidating the successive ten-day trading suspension orders in question is not reversed.

In an attempt to narrow the terrain in order to make its mootness argument seem more plausible, the S.E.C. contends that Respondent can show that this case is not moot only by demonstrating that he is likely to be adversely affected by future consecutive trading suspension orders *in Canadian Javelin Ltd.* The S.E.C. then asserts that "there is no reason to believe that it will be necessary to suspend trading again" in Canadian Javelin Ltd. (See Pet. 12). This statement is false. As noted previously, on November 8, 1976 the S.E.C. instituted an action in the District Court for the District of Columbia by filing a complaint which alleged that Canadian Javelin Ltd. was delinquent in filing its 10-K financial report with the S.E.C. That action was instituted ten days before the decision of the court of appeals of which the petition seeks review. Delinquency in filing a 10-K report with the S.E.C. is by far the most common reason given for a trading suspension order. For example, on April 11, 1974 the S.E.C. simultaneously suspended trading in securities of 48 companies and in each case the reason given for the trading suspension was the delinquency in a 10-K filing.[25] On many subsequent occasions a trading suspension has been ordered *en masse* for securities of numerous issuers which were delinquent in filing their 10-K reports such as on April 22, 1976 when the S.E.C. simultaneously suspended trading in 34 securities for that reason.[26]

Indeed, in its final April 21, 1976 order continuing its trading suspension, the S.E.C. gave as one of the reasons for the suspension the delinquency of Canadian Javelin

25. See Securities Exchange Act Release No. 10732, 4 SEC Docket 82 (April 11, 1974).

26. See Securities Exchange Act Release No. 12360, 9 SEC Docket 481 (April 22, 1976).

Ltd. "with respect to the filing of its 10-K report" (See Pet. App. 23a). From this it is obvious that the reason that the S.E.C. did not re-suspend trading in Canadian Javelin Ltd. on or about November 8, 1976, the date it filed the complaint alleging a delinquency by Canadian Javelin Ltd. in its 10-K filing, and the reason that trading in Canadian Javelin Ltd. is not suspended at the present time is that if the S.E.C. were to institute a new series of ten-day suspension orders it would demonstrate the invalidity of its mootness argument as well as violate the order of the court of appeals.

As noted previously, on September 26, 1975 the S.E.C argued before the court of appeals that the case was moot even though there was in effect a then current series of consecutive ten-day orders suspending trading in Canadian Javelin Ltd. In the prior petition for review, the S.E.C. "suggested" to the court of appeals that the controversy was moot when the trading suspension lapsed and shortly thereafter the controversy arose again because the S.E.C. instituted a new series of trading suspension orders. The fact that once before the S.E.C. said this case was moot only to have the underlying dispute between the parties arise again demonstrates that under this Court's decision in *Nebraska Press Association v. Stuart, supra,* and other cases this case is not moot.

This case is not moot for yet another reason. As noted previously, trading in Canadian Javelin Ltd. has not been permitted to resume as a result of the S.E.C.'s application of Rule 15c2-11, which places restrictions on the resumption of quotations in a security which has not been quoted for three consecutive business days. One of the principal effects of this rule is that any time trading in a security is suspended for a period of ten days or more, it can no longer be legally quoted by registered broker-dealers until all financial reporting requirements are met to the satisfaction

of the S.E.C. It is sufficiently clear in view of the pendency of the suit in the District Court for the District of Columbia that at no time in the reasonably forseeable future will the financial reports filed by Canadian Javelin Ltd. be satisfactory to the S.E.C. Since the S.E.C., by virtue of its authority to regulate "national quotations mediums" such as the pink sheets published by the National Quotation Bureau Inc., has the procedural mechanism available to prevent any security from being quoted, it is clear that the S.E.C. is in a position to prevent trading in Canadian Javelin Ltd. from ever resuming by virtue of its application of Rule 15c2-11 which only applies to securities which have not been actively quoted for three consecutive days. Since Canadian Javelin Ltd. was actively quoted up until the time of the S.E.C.'s April 29, 1975 trading suspension and since the trading suspension was the only reason that Canadian Javelin Ltd. ceased to be actively quoted, it follows that if a court were to declare all of the 37 trading suspension orders to have been invalid, the S.E.C. would be required to permit quotations and trading in Canadian Javelin Ltd. to resume not withstanding Rule 15c2-11. It is noteworthy that a memorandum dated October 17, 1975, which the S.E.C. included in the record in support of one of its trading suspension orders, states: "The S.E.C. staff also plans to further discuss with the Amex a long-term solution to the continuous CJV problem."

Perhaps at the time of this memorandum the S.E.C. already had in mind the procedure which it now uses to prevent trading in Canadian Javelin Ltd., without the necessity of issuing formal trading suspension orders, through a surprising application of Rule 15c2-11. In any event, it is apparent that there is no merit to the S.E.C.'s argument that the court of appeals should have declared this case to be moot.

II

The other principal point advanced by the S.E.C. has little more to recommend it. This concerns the S.E.C.'s claim that Congress "acquiesced" to the S.E.C.'s assumption of the power to suspend trading for periods of longer than ten days. However, "an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate." ***Federal Maritime Commission v. Seatrain Lines, Inc.***, 411 U.S. 726, 745 (1973). "[A]dministrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction." ***Norwegian Nitrogen Products Company v. United States***, 288 U.S. 294, 315 (1933). "Administrative construction over a long period of time is an available tool for judicial interpretation only when the statutory terms are doubtful or ambiguous." ***United States v. Southern Ute Indians***, 402 U.S. 159, 173 n. 8 (1971); ***Estate of Stanford v. Commissioner***, 308 U.S. 39, 52 (1939); ***Norwegian Nitrogen Products v. United States, supra.***

In order to create the impression that Congress, by enacting a statute which gives the S.E.C. the authority to suspend trading in a security "for a period not exceeding ten days", actually intended to give the S.E.C. the discretionary authority to suspend trading for an indefinite time period, the petition misrepresents several of the committee reports which it cites. For example, page 9 of the petition cites H.R. Rep. No. 1418, 88th Cong., 2d Sess. 24 (1964). However, the only reference to trading suspensions which can be found there states:

> "Section 6(c) of the bill would further amend section 15(c) of the act by adding a new paragraph (5), which would provide the Commission with authority summarily to suspend over-the-counter

trading in any security (except an exempted security) for a period not exceeding 10 days. Registered brokers and dealers would be prohibited from trading in any such security during the period or periods of suspension, and other brokers and dealers would be prohibited from making use of the mails or of any means or instrumentality of interstate commerce to trade in such security during such period."

There is nothing in this paragraph which supports the view that even the members of Congress who familiarized themselves with this committee report and voted for passage of the 1964 amendment to the Securities Exchange Act, intended to give the S.E.C. the authority to suspend trading in a security for as long as it felt inclined to do so. What the S.E.C. ultimately relies upon is not a statement by any Congressman or House Committee that the S.E.C. should be given this authority but a letter from the S.E.C. itself which was incorporated in the record of the hearings before a House subcommittee and which stated (Hearings on Investor Protection Before the Subcommittee of the House Committee Intrastate and Foreign Commerce, 88th Cong., 1st Sess. 218-219 (1963)):

"2. *Summary suspension of trading in over-the-counter securities.*—

The bill would amend further section 15(c) of the act by adding a new paragraph (5), which would provide the Commission with authority summarily to suspend over-the-counter trading in any security (except an exempted security) for periods of 10 days. Broker-dealers would be prohibited from trading in any such security during the period or periods of suspension. This provision would be a counterpart to section 19(a)(4). The Commission could invoke this suspension power in those cases

in which fraudulent or manipulative practices of the issuer or other persons have deprived the security of a fair and orderly market, or where some corporate event makes informed trading impossible and provides opportunities for the deception of investors. Trading would be resumed as soon as adequate disclosure and dissemination of the facts material to informed investment decision were achieved.

Under section 19(a)(4), the Commission has issued more than one suspension when, upon reexamination at the end of the 10-day period, it has determined that another suspension is necessary. At the same time the Commission has recognized that suspension of trading in a security is a serious step, and therefore has exercised the power with restraint and has proceeded with diligence to develop the necessary facts in order that any suspension can be terminated as soon as possible. The Commission would follow that policy in administering the proposed new section 15(c)(5)."

All that the above paragraph really says is that if Congress gives the S.E.C. the power to suspend trading in over-the-counter securities, the S.E.C. will exercise that power with restraint. This statement must be considered in light of the fact that, by the time of the passage of the 1964 amendment, the suspension power had been exercised on relatively few occasions. From 1934 to 1961, the S.E.C. suspended trading on a total of only 17 occasions. II Loss, *Securities Regulation* 852 (2d ed. 1961). Professor Loss reports that by 1969 "the Commission on more than a hundred occasions has exercised its summary power to suspend trading" including 10 in 1965, 13 in 1966, 28 in 1967, and 29 in the first nine months of 1968. V Loss,

Securities Regulation 2814, 2816 (1969 Supp.). From these figures it appears that the S.E.C. may have exercised the suspension power as few as 21 times during the thirty-year period preceding the 1964 amendment to the Securities Exchange Act, suspending altogether fewer securities than it suspended on a single day a number of times from 1974 to the present.[27]

The S.E.C.'s contention that the above quoted paragraph, cited in the petition, which is but a small part of a lengthy letter drafted by the S.E.C. itself and which was inserted in the record of a voluminous subcommittee hearing, demonstrates that Congress intended to give the S.E.C. unlimited trading suspension power, strains credulity. Similarly, the S.E.C.'s claim that the Senate acceeded to the S.E.C.'s assumption of the power to suspend trading in a security for an indefinite time period is weakened by the fact that the petition quotes a Senate report out of context. The paragraph from which the petition quotes states in full (S. Rep. No. 379, 88th Cong., 1st Sess. 66-67 (1963)):

> "The Commission has consistently construed section 19(a)(4) as permitting it to issue more than one suspension if, upon reexamination at the end of the 10-day period, it determines that another suspension is necessary. The committee accepts this interpretation. At the same time the committee recognizes that suspension of trading in a security is a drastic step and that prolonged suspension of trading may impose considerable

27. On December 13, 1976, the S.E.C. suspended for ten days trading in securities of 25 different railroads, Penn Central Co. and its affiliates. Securities Exchange Act Release No. 13064, 11 S.E.C. Docket 1176 (December 13, 1976). Of these railroad securities, 21 were resuspended for a non-successive ten-day period on May 4, 1977, along with nine others. Securities Exchange Act Release No. 13504, 12 SEC Docket 297 (May 4, 1977).

> hardship on stockholders. The committee therefore expects that the Commission will exercise this power with restraint and will proceed with all diligence to develop the necessary facts in order that any suspension can be terminated as soon as possible."

The above cited paragraphs, taken from Senate and House reports, were also cited in the brief the S.E.C. filed with the court of appeals. The decision of the court of appeals states that it reviewed the legislative history of the Securities Exchange Act as it pertains to the trading suspension power and concluded that "no express statutory authority . . . was ever enacted" for the S.E.C.'s assumption of the power to suspend trading in a security for a period exceeding ten days (Pet. App. 12a). This conclusion is correct and does not warrant Supreme Court review, particularly since the court of appeals adopted in part (Pet. App. 12a) the words of a former Chairman of the S.E.C. Professor Loss, quoting the Chairman of the S.E.C., states (II Loss, *Securities Regulation, supra* 854-855 (2d ed. 1961)):

> " 'Lately, this grant of power [§19(a)(4)] has been used to keep in effect a suspension of trading pending final delisting proceedings,' although 'No express authority for such action is contained in Section 19(a)(4).' In at least one of the most recent of the seven cases in which suspension orders accompanied the institution of delisting proceedings, the suspension order is quite bare of any emergency findings."

The S.E.C. does not and cannot claim that in 1934, when Congress originally gave the S.E.C. the power to suspend trading in a security for a period "not exceeding ten days," it intended to authorize the S.E.C. to continue a trading suspension for a more lengthy time period. There is

little legislative history on this provision of the 1934 Act because it was not included in the earlier drafts of the bill. However, it is plainly apparent that when Congress in unambiguous terms gave the S.E.C. the power to suspend trading in a security "for a period not exceeding 10 days," it meant exactly that. Moreover, the petition is silent with regard to the legislative history of the 1975 amendments to the Securities Exchange Act and says nothing about Senate Report No. 94-75 which criticized the S.E.C.'s exercise of its then existing trading suspension power. The court of appeals relied upon this report in reaching its conclusion that Congress did not and does not intend to give the S.E.C. the authority to suspend in a security for a period exceeding 10 days (See Pet. App. 13a). Indeed, it is clear that if the S.E.C. believed that Congress desires that it have the authority to suspend trading in a security for a period exceeding 10 days, it would no doubt have already asked Congress to enact appropriate amendments to the statute during the ten months which have passed since the decision of the court of appeals.

The petition also contends that the court of appeals should have deferred to the S.E.C.'s construction of the Securities Exchange Act. However, the "administrative deference rule" which forms the underpinnings of the S.E.C.'s argument does not require a court to defer to an administrative agency's expansive view of its own jurisdiction. Otherwise, the courts would be virtually powerless to curb the usurpation of authority by an agency such as the S.E.C. The S.E.C. is known to almost invariably adopt the broadest possible view of the scope of federal securities laws and its own jurisdiction and this Court has rather consistently found the views of the S.E.C. to be disentitled to deference particularly in areas such as this one which have been generally reserved for judicial resolution. See *Piper v. Chris-Craft Industries, Inc.*, 430

U.S. 1, 41 n. 27 (1977); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976); *Foremost-McKesson v. Provident Securities*, 423 U.S. 232, 259-260 (1976). Moreover, the fact emphasized in the petition that for 32 years prior to the decision of the court of appeals the S.E.C. has engaged in the practice of suspending trading in securities for periods exceeding ten days does not benefit the S.E.C. because "Congressional inaction frequently betokens unawareness, preoccupation, or paralysis." *Zuber v. Allen*, 396 U.S. 168, 185-186, n. 21, 24 (1969).

The cases cited by the S.E.C. are not helpful to its position. Both *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 381 (1969) and *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) involved situations where this Court held that an agency's interpretation *of its own regulations* was entitled to judicial deference. In the latter case, this Court emphasized that there was "no statutory limitation involved." *Id.* at 17. In the instant case, the statute involved expressly imposes a limitation by giving the S.E.C. the authority to suspend trading "for a period not exceeding ten days." The above cited cases do not stand for the proposition that the S.E.C. can override that limitation on its authority simply by ignoring it. In addition, the petition cites three cases which it claims show that "where Congress has reenacted or amended a statute without disapproving the agency's construction, Congress may appropriately be considered to have approved that construction as correct" (Pet. 9-10). However, the cases cited involve quite different situations. Moreover, the decision of the court of appeals states that it reviewed the legislative history of the 1975 amendments to the Securities Exchange Act and concluded that Congress had in fact expressed disapproval of the S.E.C.'s proclivity for suspending trading for periods longer than ten days and accordingly had enacted §12(j) and §12(k) of the Securities Exchange Act, which contain language different from that found in the predecessor statute (Pet. App. 13a-15a). The

Petition does not address this point. Instead, it devotes its discussion to the legislative history of the 1964 amendment to the Securities Exchange Act (Pet. 8-9), which was repealed in 1975.

III

For the foregoing reasons, it can be seen that the arguments presented in the petition are meritless. It does not follow, however, that the petition should be denied. The situation presented here can be analogized to cases in which this Court has allowed direct appeals from decisions of three-judge district courts convened under 28 U.S.C. §2282 (now repealed) granting injunctions against federal officials or to cases in which this Court has entertained appeals under 28 U.S.C. §1254(2) from decisions by a court of appeals invalidating a law of the United States. Of course, here S.E.C. has no right of appeal because the court of appeals did not invalidate a law of the United States and this case was not one tried by a three-judge district court. However, the court of appeals did invalidate the S.E.C.'s interpretation of a law of the United States, thereby limiting the S.E.C.'s authority to act, and it enjoined the S.E.C. by ordering it "to discontinue forthwith its adoption and use of successive ten-day suspension orders" (Pet. App. 17a). The rationale behind the statutory authorization for direct appeals in certain cases and behind the reasons this Court should dispose on the merits of the contentions presented by the S.E.C., as frivolous as they may be, is illustrated by the point made on page 31 of Respondent's petition for a writ of certiorari from the same decision of the court of appeals (See *Sloan v. S.E.C.*, No. 76-1547):

> "[I]t should be pointed out that if this Court decides not to review the decision of the court of appeals, the validity of S.E.C. procedures with respect to its trading suspension policies will, for practical purposes, have been finally and forever judicially decided without the possibility of further review in this or any other Court. This circumstances alone should be sufficient to require review of the decision of the court of appeals."

The S.E.C. does not seem to agree with this view. It does not agree that it has been enjoined and that it may never again issue successive ten-day trading suspension orders. It claims that the decision of the court of appeals has merely "cast a substantial shadow over the Commission's right to exercise its suspension powers" (Pet. 12, n. 8). Perhaps the S.E.C. is hedging in the hopes of preventing the Commissioners from having to go directly to jail if they revert to the practice of issuing successive ten-day suspension orders, failing reversal of the decision of the court of appeals. In any event, it is submitted that the petition for a writ of certiorari should not be denied although summary affirmance of the decision of the court of appeals to the extent that it invalidated the issuance of successive ten-day suspension orders may be appropriate.

As noted previously, Respondent has filed his own petition for a writ of certiorari seeking to review the same decision of the court of appeals. Among the questions presented in that petition are two which concern that part of the decision of the court of appeals which upheld the validity of the first of the 37 trading suspension orders. Parallel questions are presented as questions 3 and 4 of the instant response and it is submitted that they are so intertwined with the questions presented in the petition by the S.E.C. that they should all be resolved, if this Court grants certiorari. Question 3 concerns the substantiality of the evidence. The court of appeals had before it a record consisting primarily of expurgated memoranda and

summary trading suspension orders. Three of these memoranda are included as appendices to this petition. Although the record was brief it was sufficient to demonstrate that some of the claims which were presented to the court of appeals and which are presented again to this Court are fictitious. For example, the petition makes the self-serving statements that "the Commission made a series of separate determinations suspending trading" and "the Commission investigation . . . resulted in the filing of the Civil Action, *Securities & Exchange Commission v. Doyle, et al.*, Civ. Action No. 76-1882 (S.D.N.Y.)" (Pet. 3-4). The record casts considerable doubt on the accuracy of these statements. For one thing, there is no indication that the Commissioners themselves took any part in any of the decisions to issue the summary suspension orders. The first order is dated April 29, 1975 and is signed by the secretary of the S.E.C., George A. Fitzsimmons.[28] However, the "informational memorandum" which is included in the record to demonstrate the justification for the trading suspension is dated May 2, 1975, three days later, and is addressed to the "the Commission" and from the "Division of Enforcement". This memorandum is included as Appendix L in the Petition in No. 76-1547. It bears the names of three members of the S.E.C. staff. It is clear from this that it was the S.E.C. staff that decided to order the suspension of trading in Canadian Javelin Ltd. and it was not until three days later that they got around to sending a memorandum to the S.E.C. informing the Commissioners of the reasons for which they took this action. There is no

28. The signatures of George A. Fitzsimmons on this and subsequent orders of the S.E.C. suspending trading are identical to each other in every respect. From an examination of these signatures it is clear that they were produced by a rubber stamp or a mechanical signature writing machine rather than manually. In the first petition for review of orders suspending trading in Canadian Javelin Ltd., Respondent complained that several of the orders were not signed at all. Apparently, the S.E.C. has corrected this situation by mechanical means.

provision of the Securities Exchange Act or of the rules and regulations of the S.E.C. which permits this delegation of authority by the S.E.C. to its staff. The second trading suspension order is dated May 8, 1975 and announces a suspension of trading from May 9, 1975 through May 18, 1975. The record of this trading suspension consists of the May 2, 1975 memorandum plus a memorandum dated May 6, 1975 which states that the staff of the S.E.C. met with counsel for Canadian Javelin Ltd. and had requested that Canadian Javelin Ltd. issue "a press release relating to the trading suspension" but that company counsel had indicated that it would require additional time "in order to obtain approval for their press release." The record for the third trading suspension consists of the May 2, 1975 memorandum and a memorandum dated May 12, 1975 which is identical in all respects to the May 6, 1975 memorandum, except the date. The record of the fourth trading suspension consists of a memorandum dated May 23, 1975 which discusses an investigation by the Royal Canadian Mounted Police and states that "company counsel previously indicated that they intend to submit an appropriate release but have not yet done so." The record of the following three trading suspensions consists solely of memoranda dated May 30, 1975, June 16, 1975, and June 24, 1975 respectively, which are identical to the May 23, 1975 memorandum, the only difference being the date.

This pattern continued throughout the record of the 37 successive trading suspension orders. Each trading suspension order is supported by a memorandum which is usually identical to the memorandum supporting the previous trading suspension order but which is sometimes modified to include updated material. Even the updated material indicates that little active work was being done by the S.E.C staff in pursuing the matters which brought about the trading suspension. There is, for example, in several memoranda a discussion of corporate developments

concerning a dispute over control of Canadian Javelin Ltd. which developed in early 1976 and which resulted in litigation in Quebec Superior Court. This dispute had nothing to do with any investigation being conducted by the S.E.C. staff although it appears more than likely that this dispute was fostered by stockholder dissatisfaction with management resulting from the S.E.C.'s trading suspension.

On the basis of the record, the court of appeals was in a good position to reject the assertion of the S.E.C. that each trading suspension order was issued "on the basis of an independent determination made at the time that continued suspension was required in the public interest and for the protection of investors" (Pet. App. 11a-12a). None of the memoranda even so much as state that the public interest or the protection of investors would be served by a trading suspension. Rather, the memoranda indicate that the trading suspension was being used as a negotiating point in discussions between the S.E.C. staff and counsel for Canadian Javelin Ltd. In other words, the S.E.C. staff was offering to lift the trading suspension if management of Canadian Javelin Ltd. would cooperate with the S.E.C. in various ways. Since none of the officers of Canadian Javelin Ltd. were residents of the United States, the S.E.C. did not have available subpoena power or other means to coerce testimony or the production of documents. Consequently, the S.E.C. attempted to use its trading suspension power to obtain leverage to secure the "cooperation" of officers Canadian Javelin Ltd. The initial memoranda indicate that the S.E.C. expressed a willingness to lift the suspension of trading in Canadian Javelin Ltd. if the company would issue "an appropriate press release." Subsequent memoranda state that the S.E.C. staff was requesting the cooperation of officers of Canadian Javelin Ltd. including John C. Doyle, its principal stockholder, and his son, who was also an officer of Canadian Javelin Ltd., and was

asking them to agree to meet with and give sworn testimony before members of the S.E.C. staff and to agree to waive their Fifth Amendment rights and their rights to attorney client privilege.[29] The latter request appears to relate to an S.E.C. rule, since declared unconstitutional in *S.E.C. v. Csapo*, 533 F. 2d 7 (D.C. Cir. 1976), which authorized the S.E.C. under certain circumstances to prohibit a person testifying before it pursuant to an order of investigation from appearing with counsel of his choice. Most of the memoranda issued during mid-1975 contain discussions of efforts by the S.E.C. staff to get officers of Canadian Javelin Ltd. to cooperate along the lines of waiving various privileges. Although these memoranda are generally optimistic, it turned out that the efforts of the S.E.C. to obtain cooperation failed. An S.E.C. staff memorandum in the record dated October 1, 1975, which is included as Appendix C to this petition, states that the board of Canadian Javelin Ltd. met in Costa Rica on September 28 and 29, 1975 and refused to waive any attorney-client privilege and that neither the president of Canadian Javelin Ltd. nor Doyle nor his son intended to meet with the S.E.C. staff. Subsequent memoranda indicate that thereafter the S.E.C.'s investigation ground to a halt.

Page 4 of the petition states that the S.E.C.'s investigation resulted in the filing of a suit entitled *S.E.C. v. Doyle*, Dkt. No. 76-1882 (S.D.N.Y.). That statement is

29. In 1974 in Newfoundland, Doyle testified voluntarily before members of the S.E.C. staff. Pursuant to the Freedom of Information Act, Respondent has obtained from the S.E.C. a transcript of this testimony and it shows that after identifying himself, Doyle asserted the Fifth Amendment privilege to every question asked. Papers filed in Doyle's behalf on August 24, 1977 in the Southern District of New York in *S.E.C. v. Doyle*, 76 Civil 1882 (WCC), state that Doyle is still amenable to testifying before the S.E.C., as long as the testimony is taken in Panama. (He is now a fugitive from justice in both the United States and Canada). However, he apparently intends again to assert the Fifth Amendment privilege.

false. On March 8, 1976, a criminal information was released in Canada containing 406 charges of wash-trading in the shares of Canadian Javelin Ltd. by five individuals including John C. Doyle. The civil suit cited by the S.E.C. was filed on April 26, 1976 and the defendants were the five individuals named in the criminal information plus four corporations which they allegedly controlled. The allegations in the S.E.C.'s complaint closely paralleled the wash-trading charges in the criminal information.[30] Canadian Javelin Ltd. was not named as a defendant in the S.E.C.'s civil suit and there is no indication in the informational memoranda supplied by the S.E.C. or elsewhere that the allegations in the complaint were based on anything other than the charges contained in the criminal information released in Canada. It is true that several of the memoranda in the record state that the filing of the suit would be closely timed with the lifting of the trading suspension. However, none of the memoranda state that the suit was based upon information uncovered by the S.E.C. during the course of its investigation. For that matter, the term "wash-trading" is not to be found in any of the memoranda supporting the trading suspensions nor is it discussed in any of the 10,000 pages of material Respondent has obtained from the S.E.C. pursuant to the Freedom of Information Act. Indeed, no specific illegal conduct on the part of Canadian Javelin Ltd. or anyone else is set forth in any of the memoranda dated prior to the release on March 8, 1976 of the criminal information beyond use of the words "manipulation" and "manipulative activities." Moreover, upon filing suit the S.E.C. promptly lost interest in the case. The S.E.C. made no attempt to effectuate service of the summons and complaint upon the defendants and the case lay dormant until one year later when the S.E.C. filed a motion for

30. The complaint is described in Litigation Release No. 7371, 9 SEC Docket 535 (April 26, 1976).

extra-territorial service of process returnable April 8, 1977, just two weeks prior to the date the instant petition for writ of certiorari was originally due. It is apparent from the timing of this motion that the belated attempt by the S.E.C. to prosecute that case stems primarily from the desire of the S.E.C. to buttress its position with respect to the instant petition and to answer the point made by Respondent to the court of appeals concerning the lack of prosecution of the S.E.C.'s suit against Doyle.

The record of this case, consisting as it does of expurgated memoranda of the type included in Appendix A, B and C herein as well as Appendix L of the petition in No. 76-1547, does not come close to meeting the substantial evidence test. This in itself should form sufficient basis for vacating the trading suspension orders of the S.E.C., as the court of appeals indicated in its earlier opinion, *Sloan v. S.E.C.*, 527 F. 2d 11, 12 (2d Cir. 1975). Moreover, the memoranda demonstrate that it was lack of cooperation by Canadian Javelin Ltd. and its officers, not illegal conduct, which led the S.E.C. to continue its trading suspension for more than a year. This was clearly improper particularly since it was not the stockholders who were uncooperative, yet it was they who suffered from the trading suspension.[31] Further, even assuming there were acts by Canadian Javelin Ltd. and its officers which might be deemed to

31. The financial loss suffered by Respondent as a direct result of the trading suspension and the hostility of the S.E.C. to Respondent's interests is illustrated by a no-action letter the S.E.C. gave to a legal adversary of Respondent permitting the sale during the period of the trading suspension of 1,000 shares of Canadian Javelin Ltd. belonging to Respondent and obtained pursuant to an order of attachment, at a public auction, at a severely depressed price. See "Canadian Javelin Ltd." S.E.C. Division of Market Regulation (*December 16, 1975*) CCH Fed. Sec. Law Rep. ¶80,417 [1975-76 Transfer Binder] At the same time, the Freedom of Information Act material obtained from the S.E.C. shows that it denied a request for a no-action letter by Interstate Securities, Inc., a brokerage firm in Charlotte, N.C., which sought permission to sell suspended Canadian Javelin Ltd. shares on the Montreal Stock Exchange.

violate federal securities laws, these acts occurred outside of the United States and hence were not illegal since under the principles set forth in Section 18 of the Restatement (Second) of the Foreign Relations Laws of the United States (1965) (cf. *Racaman v. Barish*, 408 F. Supp. 1189, 1195 n. 3 (E.D. Pa. 1975)) the federal securities laws do not have extra-territorial application inasmuch as they embody concepts unknown to the laws of all other nations (except in some cases Canda) with "reasonably developed legal systems."

IV

In holding that by issuing a series of successive trading suspension orders the S.E.C. violated statutory provisions, the court of appeals stated (Pet. App. 14a-15a):

> "It is not necessary to deal with this point as a constitutional violation, because the procedures adopted by the S.E.C. plainly transgressed the statutory provisions."

Thus, if this Court agrees with the arguments presented by the S.E.C. regarding legislative intent, it must reach the question of whether the successive ten-day trading suspension orders violate the constitution. That question has been presented in the instant response as well as in the cross-petition in No. 76-1547.

It is submitted that the trading suspension which is the subject of the instant petition, lasting as it did from April 29, 1975 until May 2, 1976, during which time neither Respondent nor anyone else was accorded notice or the opportunity for a hearing,[32] plainly transgressed the

32. The Freedom of Information Act material obtained by Respondent contains more than a hundred letters from stockholders of Canadian Javelin Ltd. as well as members of Congress and others protesting one or more of the trading suspensions. Many of these letters were from attorneys who demanded hearings. None of these requests for a hearing were granted.

Constitution. The S.E.C. points to a procedure announced on April 22, 1976 under which a person adversely affected may petition the S.E.C. not to renew the suspension (Pet. 11, n. 6; Pet. App. 24a-26a). However, the promulgation of that procedure merely gives lip service to the constitutional right to a hearing, as the S.E.C.'s first and, to date, only exercise of the procedure demonstrates (See Pet. App. 21a-23a). The procedure requires the petitioner to "set forth with particularity facts upon which petitioner relies" (Pet. App. 25a). However, since the S.E.C. usually does not reveal the reasons for its continued trading suspension, the procedure shifts the burden of proof to the petitioner, who must try to disprove the facts upon which the trading suspension is based without knowing what those facts are. In the instant case, as in most cases, the S.E.C. did not reveal the reasons for its year-long trading suspension until it issued Securities Exchange Act Release No. 12394, 9 S.E.C. Docket 509 (April 29, 1976), in which it announced that the trading suspension would be terminated. The only clue provided by the S.E.C. prior to that time as to the reasons for the trading suspension was a single sentence in the release announcing the initial suspension which stated that the suspension was ordered "pending dissemination of information concerning regulatory action by Canadian authorities."[33] A copy of that release is included as Appendix D to this petition. In addition, the procedure states that it may not be utilized by anyone who "shall fail to cooperate" with the Commission (Pet. App. 25a). In the instant case, the very reason for the trading suspension was a determination by the S.E.C. staff that there had been a failure to cooperate. Thus, the promulgation of the cited procedure does not modify a situation rife with potential for abuse of constitutional rights. See *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959).

33. Canadian Javelin Ltd. stated in its annual report to stockholders that it did not know the reason for the trading suspension.

It is submitted that the underlying statute, namely §12(k) of the Securities Exchange Act, 15 U.S.C. §78l(k), is unconstitutional for at least three reasons. First, the statute does not set forth standards to be observed by the S.E.C. in its determination of when "the public interest and the protection of investors so require" a trading suspension. Due to this absence of standards, the statute authorizing the S.E.C. summarily to suspend trading in a security is an unconstitutional delegation of legislative authority to an administrative agency.[34] See *National Cable Television v. United States*, 415 U.S. 336, 342 (1974). Second, a trading suspension does not serve sufficiently important governmental interests as to justify the severe deprivation of property interests which it entails prior to notice and the opportunity for a hearing. *Fuentes v. Shevin*, 407 U.S. 67, 90-93 (1972); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974). Even a ten-day suspension from high school without notice or a hearing is unconstitutional. *Goss v. Lopez*, 419 U.S. 565, 579-584 (1975). Third, a trading suspension by the S.E.C. prohibits purchases and sales of securities which are purely intrastate in character. Regulation of intrastate securities transactions is beyond the reach of the commerce clause of the Constitution. Therefore, the attempt through the exercise of §12(k) of the Securities Exchange Act to prohibit intrastate trading in a security such as Canadian Javelin Ltd. is unconstitutional.

34. It should be noted that the decision as to whether a foreign corporation should be prohibited from having its shares sold in the United States involves foreign policy considerations which are within the exclusive province of the President and Congress. Cf. *Chicago & Southern Air Lines, inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 109-110 (1948).

CONCLUSION

For all of the reasons set forth above, the petition for a writ of certiorari should be granted and this Court should affirm the order of the court of appeals to the extent that it vacated a total of thirty-six consecutive ten-day suspension orders.

Respectfully submitted,

SAMUEL H. SLOAN
1761 Eastburn Avenue, Apt. A5
Bronx, New York 10457
(212) 864-5770 or 299-2095

Dated: New York, New York
September 20, 1977

APPENDIX A—MEMORANDUM DATED JULY 1, 1975 FROM THE DIVISION OF ENFORCEMENT TO THE COMMISSION

MEMORANDUM

File No.: HO-815
Date: July 1, 1975

TO: The Commission

FROM: The Division of Enforcement

RE:
DATE FILED:
AMENDED:
SUBJECT: Canadian Javelin Limited
RECOMMENDATION: [redacted]

ACTION REQUESTED BY:
NOVEL, UNIQUE OR COMPLEX ISSUES: None

This suspension began on April 29, 1975 in response to a public announcement by the Royal Canadian Mounted Police ("RCMP") that it was investigating an alleged manipulation of Canadian Javelin's common stock on Canadian stock exchanges and the American Stock Exchange ("AMEX")

Since continuance of the Commission's last 10 day trading suspension, members of the staff have taken testimony in this matter in Montreal, and St. John's, Newfoundland, and information is being exchanged with the RCMP. Much of the Canadian information was ob-

tained by the RCMP [redacted] in Canada in 1975 which is the time period the staff's investigation is focusing on. The information gathered thus far, including testimony and documentary evidence, shows that brokers in Canada and the United States, assisted directly or were in some way involved since January 1975 in an attempt to manipulate Canadian Javelin's stock.

The staff met with representatives of the AMEX on June 27, 1975 which is conducting its own inquiry and we are further advised that they will continue their trading suspension until the Commission is in a position to reveal the extent of the manipulation and its participants. Canadian Javelin is deemed by the AMEX to be a chronic violator and thought is being given to a possible delisting of the security.

A meeting was held on June 26, 1975 with special counsel to the company who was requested to investigate several transactions involving the company during the height of the alleged manipulation. In addition, company counsel has promised the staff that a meeting will be arranged with John C. Doyle during the month of July. Mr. Doyle, a fugitive from justice stemming from a securities conviction in 1965, is the largest single shareholder and has controlled the direction of Canadian Javelin since its inception. The staff has traced Mr. Doyle's telephone in Nassau to have been frequently called by certain persons believed to have been directly involved with wash trading during the relevant period. Furthermore, company counsel has not yet submitted an appropriate press release as was recently promised. The staff hopes to conclude the investigation shortly after it meets with Mr. Doyle.

[redacted]

Prepared by:

DPDoherty, Assistant Director (51246)
RGRyan, Branch Chief (51569)
H. Ammerman, Attorney (51476)

APPENDIX B—MEMORANDUM DATED APRIL 9, 1976 FROM THE OFFICE OF GENERAL COUNSEL TO THE COMMISSION

MEMORANDUM

April 9, 1976

TO: The Commission
FROM: Office of the General Counsel
RE: The "petition" of Samuel H. Sloan that the Commission "review all orders of the suspension of trading in Canadian Javelin, Ltd. from November 29, 1973 to and including such date as this petition may be decided." Mr. Sloan demands that the Commission declare all of the previous Canadian Javelin trading suspensions illegal and that the Commission issue an order declaring that there will be no further suspensions of trading in Canadian Javelin Ltd.

RECOMMENDATION: [redacted]

OTHER OFFICES AND DIVISIONS
CONSULTED: Division of Enforcement.

NOVEL, UNIQUE OR COMPLEX ISSUES
INVOLVED: This will be the initial use of the procedure

recently adopted by the Commission for handling objections to summary trading suspensions.

Background

As the Commission will recall the United States Court of Appeals for the Second Circuit, in October, 1975, rejected Mr. Sloan's attack on summary trading suspensions based upon the Commission's representation that we would give a person who claimed to be aggrieved by such a suspension an opportunity to be heard (*Sloan v. Securities and Exchange Commission*, C.A. 2, No. 74-2457). The Court indicated at that time that such a hearing should result in a record which could later be reviewed on appeal if that became necessary. As a result of that decision the Commission recently indicated that it would issue a release announcing the adoption of a procedure whereby a person claiming to be adversely affected by a suspension could petition the Commission not to renew such a suspension.[1] The release is to state that such petitions "may not be in the form of a letter or other statement, should set forth with particularity the facts upon which petitioner relies and should be sworn to by the petitioner or an authorized officer of the petitioner."

Facts

On or about March 15, 1976, Mr. Sloan served the Commission with a document entitled "VERIFIED PETITION FOR REVIEW"[2] (a copy of which is attached) and an affidavit in support thereof. In his "petition" Mr.

1. See Attachment A to memorandum of this Office and the Division of Enforcement, dated March 11, 1976, a copy of which Attachment is appended hereto.

2. This petition was filed in accordance with a staff instruction to Mr. Sloan, since he had previously attempted to obtain review by filing a copy of voluminous briefs and unsworn allegations he had filed in various court proceedings.

Sloan asks the Commission to review all of the suspensions of trading in Canadian Javelin, Ltd. securities from November 29, 1973, up to and including the date this petition may be decided. He further demands a hearing and a declaration that all suspensions of trading in Canadian Javelin have been illegal. He finally demands that the Commission issue an order declaring that there will be no further suspensions of trading in Canadian Javelin. In the affidavit attached to the petition Mr. Sloan alleges, among other things, that Section 12(k) only permits the Commission to suspend trading for a ten-day period and that the renewal of suspensions violates that statutory provision. Mr. Sloan then purports to make an analysis of the market conditions in the stock of Canadian Javelin at the times the Commission instituted various trading suspensions and concludes that the suspensions were in aid of a market manipulation. Mr. Sloan states that the only conclusion that he can reach is that "Mr. Doyle is bribing a person or persons at the S.E.C. . . ."

[redacted]

[redacted]

DFerber-51170
MJStewart-51224
FBWade-51286

ATTACHMENTS:

1) Draft notice of suspension of trading and denial of petition for review.

2) Draft letter to Mr. Sloan.

3) Attachment A memorandum dated March 11, 1976.

4) Verified Petition for Review.

5) Mr. Sloan's affidavit in support of his petition.

APPENDIX C—MEMORANDUM DATED OCTOBER 1, 1975 FROM THE DIVISION OF ENFORCEMENT TO THE COMMISSION

MEMORANDUM

FILE NO.: HO-815
DATE October 1, 1975

TO: The Commission
FROM: Division of Enforcement
RE: Canadian Javelin Limited ("CJV")
DATE FILED:
AMENDED:
SUBJECT:
RECOMMENDATION: [redacted]

ACTION REQUESTED BY:
NOVEL, UNIQUE OR COMPLEX ISSUES: None

The securities of CJV were initially suspended on April 29, 1975 in response to a public announcement by the Royal Canadian Mounted Police ("RCMP") that it was investigating an alleged manipulation of Canadian Javelin's common stock on Canadian stock exchanges and the American Stock Exchange ("AMEX").

The investigation to date has revealed that from the commencement of trading on January 27, 1975 until the Commission's tradiiiing suspension on April 29, 1975 CJV's stock has been continually manipulated on the AMEX as well as several Canadian stock exchanges. The manipulation appears to involve Americans, Canadians and Panamanians. It also appears that John C. Doyle ("Doyle"), CJV's founder, former chairman of the

executive committee and currently a director has been behind the manipulation.

The staff has requested a meeting with the president of CJV, Doyle, director of CJV, Doyle's son, a vice president of CJV, Canadian counsel for CJV and the partner in charge of CJV's independent auditor.

Canadian counsel for CJV has informed the staff that approval of the board of directors is necessary in order for the president of CJV and its counsel to testify before the Commission and to furnish information concerning certain sensitive areas involving corporate activities. He also recently advised that on September 28 and 29, 1975 the board met in Costa Rica and authorized CJV counsel to furnish information to the staff; however, the board refused to waive any attorney-client privilege. With respect to our meeting with the President of CJV and the Doyles, counsel advised the staff that neither the president nor the Doyles intend to meet with the Commission's staff. The staff intends to pursue every available recourse to compel the testimony of these witnesses. We have also been advised that a Panamanian attorney, under CJV direction, has prepared a report of investigation concerning the manipulation which will be forwarded to the staff.

[redacted]

RJRyan (51469)
LLevine (51468)
HAmmerman (51476)

APPENDIX D—SECURITIES EXCHANGE ACT RELEASE NO. 11383 (APRIL 29, 1975)

SECURITIES EXCHANGE ACT OF 1934
Release No. 11383/April 29, 1975

The Securities and Exchange Commission announced the suspension of trading in all securities of Canadian Javelin Limited pursuant to Sections 15(c)(5) and 19(a)(4) of the Securities Exchange Act of 1934 for the ten-day period commencing at 3:45 p.m. (EDT), April 29, 1975 and continuing through midnight (EDT), May 8, 1975.

The Commission instituted the suspension pending dissemination of information concerning regulatory action by Canadian authorities.

The Commission cautions broker-dealers, shareholders and prospective purchasers that they should consider carefully the foregoing information along with all other currently available information and any information subsequently issued by the company.

Furthermore, brokers and dealers should be alert to the fact that, pursuant to Rule 15c2-11 under the Exchange Act, at the termination of the suspension, no quotation may be entered unless and until they have strictly complied with all of the provisions of said rule. If any broker or dealer has any questions as to whether or not he has complied with said rule, he should not enter any quotation but immediately contact the staff of the Securities and Exchange Commission, Division of Enforcement in Washington, D.C. If any broker or dealer is uncertain as to what is required by Rule 15c2-11, he should refrain from entering quotations relating to the securities in question until such time as he has familiarized himself with said rule and is certain that all of its provisions have been met. If any broker or dealer enters any quotation which is in violation of said rule, the Commission will consider the need for prompt enforcement action.